86-479

No. 86

Supreme Court, U.S.
FILED
SEP 13 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The Supreme Court of the United States

October Term 1986

Bill J. Cory,

Petitioner

v.

Uniroyal, Inc.,

Respondent

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

Bill J. Cory, Pro Se
Apartment 204
2574 Chain Bridge Road
Vienna, Virginia 22180
(703) 938-3589

QUESTION PRESENTED

Whether the right to trial by jury as provided for by the Seventh Admendment to the Constitution of the United States was violated since the facts of the case had never before been presented or decided upon their merits; and res judicata or collateral estoppel could not be properly invoked by the courts below.

[1] J.P. Flannery, President of Uniroyal, Inc., is a defendant in this action.

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Respondent

Petition for a Writ of Certiorari to the
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for the Fourth Circuit

The Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this matter on 22 May 1986.

OPINIONS BELOW

The 22 May opinion of the Court of Appeals for the Fourth Circuit whose judgment is herein sought to be reviewed is reprinted in the Appendix to this

Petition, pp. 1-5. The prior opinion of the United States District Court for the Eastern District of Virginia, Alexandria Division are also reprinted in the Appendix, pp. 8-21.

JURISDICTION

The judgment of the Court of Appeals was entered 22 May 1986. A timely petition for rehearing was denied on 17 June 1986 (Appendix, p. 22). The jurisdiction of this Court is invoked pursuant to 28 USC, Section 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Seventh Admendment to the Constitution of the United States which provides:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law."

STATEMENT OF CASE

This case involves a conspiracy by Uniroyal, Inc., and independent dealers of Uniroyal tires who

implemented a widespread scheme to defraud the Public by using false and misleading tire warranties. In the mid-1970's the automobile industry decided to put steel belted radial tires on its new cars as original equipment. To meet this demand and since the majority of General Motors cars were equipped with Uniroyal tires, Uniroyal fraudently placed steel belted radial tires in the marketplace knowing full well from quality assurance and field tests that they did not know the proper design and construction techniques, and fabrication process to make 'usable on the road' safe tires of this type. As a consequence, Uniroyal knew large numbers of defective tires would be replaced under warranty and, accordingly devised a warranty scheme using inflated replacement tire prices not only to cover losses but increase profits through captive buyers of replacement tires.

In March 1980, the National Highway Traffic Safety Administration (NHTSA) caused Uniroyal to recall approximately ten million tires for safety related defects pursuant to the National Traffic and Motor Vehicle Safety Act (NHTSA, Office of Defects

Investigation (ODI) Case C9-19). The Petitioner had five original equipment tires and one replacement tire blow out due to tread separation, the same defect that initiated the NHTSA recall. In review of NHTSA Case ODI C9-19, the Petitioner found that his 70-series tires were manufactured within the time limits specified for recall, but had not been recalled because Uniroyal convinced NHTSA that this tire size would unnecessarily complicate the paperwork.[2]

The Petitioner was charged pro rata the inflated replacement tire price from the "then current Uniroyal Adjustment Base Price List" (ABPL) for defective tires #4 and #5. The warranty is devoid of standards for pricing replacement tires and the

[2] From ODI Case C9-19, Letter from Uniroyal to NHTSA:

> "Collectively these various nonstandard tires comprise only a minor portion of the volume of the Zeta 40 PR6 and the TPC PR6 lines, and much of it is in recent production.
> Consideration of this material seems outside the scope of the inquiry. Full inclusion of it would have unnecessarily complicated many of our answers.
> . . ., but we have omitted the aberrent 60 series, 70 series, and P-metric tires from analysis and consideration in regard to the other questions."

unsuspecting customer does not know that the ABPL quoted prices 30-100% higher than the dealers floor price for the same tire. Further, the ABPL was fraudently applied and the Petitioner was charged for two tires that were higher in price than the tires received. The tires actually placed on the vehicle normally sell for $60, but on this day were held for sale on the dealer's floor for $71.95 each. Upon examination of the Uniroyal ABPL's submitted for trial, the price listed for the same tires was $82.44. The Petitioner was charged and paid Uniroyal at a rate of $96.75 per tire. Uniroyal has continuously denied wrongdoing.

The fraudulent scheme of Uniroyal encompassed the issuance of warranties which were fashioned to mislead the purchaser and beguile him into believing that he could purchase a replacement tire for a pro rata share close to the original cost of the tire or a similarly reasonable price, such as the dealer's current selling price on the floor. Actually, Uniroyal required that the ABPL be used which contained prices far in

excess of dealer floor prices or any price that a reasonable man could foresee.

The Petitioner learned, after tire #6 blew out, of the NHTSA recall in June 1985, and subsequently filed suit under Title 18 U.S.C., Section 1961 et seq., RICO, in United States District Court for the Eastern District of Virginia, Alexandria Division. Previously in 1984, and after original equipment tires #4 and #5 blew out on the same night, the Petitioner had filed a Warrant in Debt in General District Court of Fairfax County (App. 24) for $235.22, the cost of replacing five (5) unmerchantable tires under the terms of the Uniroyal warranty and $1000.00 punitive damages. The U.S. District Court held that the Petitioner was barred by res judicata and thus collaterally estopped from litigating the issue (App. pp. 8-21). The U.S. Court of Appeals for the Fourth Circuit affirmed (App. pp. 1-5) and a timely Petition for Rehearing was denied on 17 June 1986 (App. pp. 22-23).

REASONS FOR GRANTING THE PETITION

Fraudulent and misleading warranties are paid for by the Public and act as an unfair trade restriction

against corporations who use good business practices. As a matter of public policy the courts must continue to promote consumer welfare, fair competition, and provide a means of action against those who injure competition and coerce consumers. Product warranties are of increasing economic importance to consumers. Therefore the desired result of this suit is to address the requirement of standards in warranties and to provide the Public with established recourse in the courts in the event of a large-scale warranty violation such as Uniroyal.

The decision of the trial court denied the Petitioner his right to have the facts of this case tried by jury as provided for by the Seventh Amendment. The court decision is contrary to the decisions of this Court which has stated that the facts must have been tried and that a most significant safeguard is the requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate. Parklane Hosiery v. Shore, 439 U.S. 331 (1979). The Seventh Circuit in Ray v. Indiana & Michigan Elec. Co., 758 F.2d 1148(1985) listed four

conditions that must be established to invoke the doctrine of collateral estoppel:

(1) A final determination on the merits must have been reached in the case;

(2) The issues for which estoppel are sought must have been essential to that decision;

(3) The party against whom estoppel is invoked must have had full opportunity to address the issues in that case; and

(4) The issues must be identical to the issues in the case in which estoppel is sought.

In January 1985, in General District Court of Fairfax County, the Petitioner sued Uniroyal by Warrant in Debt (App. p. 24) for $235.22, the cost of replacing five (5) unmerchantable tires under the terms of the Uniroyal warranty and $1000.00 punitive damages. The Petitioner was the only witness at trial and he was not allowed to testify as to the merchantibility of the tires since he was not qualified as an expert witness on tires. The tires were not in evidence since they had been returned to Uniroyal under the terms of the warranty. No evidence was

presented and the case was never tried on its merits. The trial court granted a judgment for the defense on a motion to strike. In the case of five (5) unmerchantable tires a final judgment on the merits was never rendered in General District Court, and, therefore collateral estoppel or res judicata cannot be applied to this present case.

There is no identity of the cause of action in the present case to the "unmerchantible tires" cause of action in State court. The current case is a RICO claim alleging fraud and conspiracy. This case was brought on new evidence: two replacement tires have blown out and NHTSA Case C9-19, the Uniroyal recall was discovered.

The Petitioner would not have been permitted to bring this Cause of Action in General District Court since only federal courts have jurisdiction over RICO claims. (Greenview Trading Co., Inc. v. Hershman & Leicher, No. 22790, N.Y. App. Div., 1st Dept., 6/3/85; Main Rusk Associates v. Interior Space Constructors, Inc., No. 01-85-0400-CY, Tex. Ct. App., 1st Dist., 10/10/85). In fact, the courts have held that a fraud

claim in State Court is not an identical cause of action for fraud under RICO. (Ralston v. Copper, D.C. Mich. 1983, 569 F. Supp. 1975.)

Jury trial in General District Court is prohibited by the Constitution of Virginia. Trial by jury was demanded for the RICO claim.

The trial court decision was far afield from the principles that have led this Court to describe that one must have full and fair opportunity to litigate the facts and receive judgment based upon the merits. The Petitioner believes this case presents an appropriate opportunity for this Court to confirm the validity of many judicial decisions and reaffirm the right to trial by jury still exists under the Constitution of the United States of America.

CONCLUSION

WHEREFORE, Petitioner prays that a Writ of Certiorari be granted and the decision of the Court below reversed and remanded.

Respectfully submitted,

Bill J. Cory, Pro Se
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2574 Chain Bridge Road
Vienna, Virginia 22180
(703) 938-3589

12 September 1986

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-1023

Bill J. Cory,

Appellant,

versus

Uniroyal, Inc.,

Appellee,

and

J.P. Flannery,
President, Uniroyal, Inc.,

Defendant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Richard L. Williams, District Judge. (C/A No. 85-728-A)

Submitted: April 28, 1986 Decided: May 22, 1986

Before MURNAGHAN and ERVIN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

(Bill J. Cory, Appellant Pro Se. John E. McIntosh, Jr., Boothe, Prichard & Dudley, for Appellee.)

PER CURIAM:

Bill J. Cory sued Uniroyal, Inc. in federal district court for damages allegedly arising out of the sale and replacement of defective tires. Cory brought this complaint in four counts for:

(1) violation of the Racketeer Influenced and Corrupt Organizations Act (RICO) through use of an inflated price list in connection with warranty replacements;

(2) violation of RICO through the knowing sale of defective tires;

(3) negligence in failing to recall defective tires; and

(4) failure to abide an order of the court.

The district court entered judgment for Uniroyal on all four counts with the exception that Cory's claims arising out of a May 1985 tire failure were dismissed without prejudice. We affirm.

A violation of RICO, 18 U.S.C. § 1962(c), requires "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." Sedima, S.P.R.L. v. Imrex Co., ___ U.S. ___, 53 U.S.L.W. 5034, 5038-39

(July 1, 1985). A "'pattern of racketeering activity' requires at least two acts of racketeering activity." 18 U.S.C. § 1961(5). "Racketeering activity" is defined to include mail fraud, 18 U.S.C. § 1961(1), asserted by Cory to be the racketeering activity engaged in by Uniroyal.

The act of mail fraud asserted by Cory is Uniroyal's promulgation of an Adjustment Base Price List (ABPL) containing prices higher than various floor prices for the tires. Cory claims that on May 30, 1984, he had to replace two tires then under warranty, and that Jake's Tire prorated the cost of the two tires on the basis of the APBL. Because the APBL prices were higher than the floor prices, Cory's adjusted warranty price, although still lower than the floor price, was allegedly higher than it should have been. The May 30, 1984 tire purchase is the only time Cory asserts that he was overcharged due to inflated APBL prices. Therefore, even if the ABPL pricing could somehow be characterized as mail fraud, which we doubt, Cory has failed to demonstrate the requisite "two acts" of racketeering activity.

Nor has Cory stated any other type of racketeering conduct. He claims that Uniroyal sold him unmerchantable tires. As held by the district court, the issue of whether five of these tires were unmerchantable had been decided adversely to Cory in state court. As to a sixth tire, the district court found itself without jurisdiction, either under RICO or pursuant to diversity jurisdiction, to address Cory's claim that the tire was defective. Uniroyal did not, by placing an allegedly defective tire on the market, or by failing to recall that tire, engage in racketeering activity. Moreover, as Cory replaced the tire for $61.24, his claim would not meet the $10,000 jurisdictional requirement for diversity jurisdiction.

Cory also claims that Uniroyal fraudulently denied in state court that the tires were defective. Uniroyal's defense of the state court action would not, however, constitute racketeering activity within the meaning of 18 U.S.C. § 1961(1).

Cory's final claim, based upon Uniroyal's alleged non-compliance with the district court's scheduling order, is totally without merit. Finding the judgment

of the district court to be proper in all respects, we affirm. We dispense with oral argument because the facts and legal contentions are adequately developed in the materials before the Court, and argument would not aid the decisional process.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

BILL J. CORY	)	
	)	
Plaintiff	)	
	)	Civil Action No. 85-728-A
v.	)	
	)	
UNIROYAL, INC.	)	
	)	
Defendant.	)	

ORDER

This matter comes before the Court on defendant's motion for summary judgment. For reasons stated in the accompanying memorandum, the Court hereby GRANTS defendant's motion and enters JUDGMENT in favor of the defendant on all four counts, with the following exception. The Court specifically reserves judgment on all causes of action with respect to the failure in May 1985 of plaintiff's replacement tire, and dismisses the Complaint as to this tire failure without prejudice.

Let the Clerk send a copy of this order to plaintiff and all counsel of record.

(Jan 10, 1986)
DATE

(Richard L. Williams)
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

BILL J. CORY	)	
	)	
Plaintiff	)	
	)	Civil Action No. 85-728-A
v.	)	
	)	
UNIROYAL, INC.	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

This matter comes before the Court on defendant's motion for summary judgment. For reasons stated below, the Court hereby GRANTS defendant's motion.

Procedural Posture of the Case:

On June 24, 1985, plaintiff filed a "Complaint for Damages" against Uniroyal and its president, Mr. J. P. Flannery, concerning certain allegedly defective tires he received as original equipment on a 1977 Pontiac. Plaintiff had purchased this Pontiac new in October 1976.

In response to plaintiff's complaint, defendants filed a motion to dismiss. The Court ruled on this motion on August 12, 1985 and granted it in part. The Court dismissed the complaint without prejudice and granted the plaintiff fifteen (15) days in which to file an amended complaint.

Plaintiff then filed an amended "Complaint for Damages" against the defendants, and the defendants in response filed another motion to dismiss. Plaintiff filed simultaneously a motion to vacate the Court's scheduling order. On September 27, 1985, this Court granted Mr. Flannery's motion, dismissing the Complaint as to him, but denied Uniroyal's motion to dismiss and plaintiff's motion to vacate the scheduling order.

Discovery has since concluded and defendant Uniroyal now comes before the Court requesting that summary judgment be entered in its favor.

Statement of Facts:

In October 1976, plaintiff purchased a new 1977 Pontiac, having as original equipment five Uniroyal PR6 WSW radial steel belted tires. About five years later, in September 1981, one of the tires failed due to tread separation. The tire was adjusted and replaced at a cost of $47.63. In April 1982, a second tire failed, again due to tread separation. Plaintiff attempted to have the tire replaced by Pan American Tires in Daytona Beach, but Pan American refused to honor the Uniroyal warranty. The tire was replaced ultimately by American Tires in Atlanta at a cost of $39.15.

At that point, plaintiff brought suit in the Fairfax County General district Court against Master Auto Service and Uniroyal for Pan American Tires' refusal to honor the Uniroyal warranty. He obtained a default judgment against both defendants in the amount of $184.00 and the judgment was satisfied.

A third tire failed in December 1983, again due to tread separation, and, pursuant to the manufacturer's warranty, was replaced by Pan

American Tires of Daytona Beach at a cost of $21.14. The two remaining tires failed in May 1984 and were replaced by Jake's Tire of Terre Haute, Indiana, at a cost of $127.30.

After these tire failures, plaintiff brought suit against Uniroyal in the Fairfax County General District Court, seeking $235.22 in compensatory damages and $1000 in punitive damages for the sale of five unmerchantible tires. Plaintiff computed the amount of compensatory damages based on the amount of money that he was charged for the five tires; he included therein what he considered an overcharge on tires number 4 and 5. (In determining the price of these latter two tires, Jake's Tire had relied on Uniroyal's Adjustment Price Index, the prices of which plaintiff insists are inflated.)

On January 2, 1985, following plaintiff's case-in-chief (which consisted only of plaintiff's own testimony), the trial court granted defendant's motion to strike the plaintiff's evidence. The trial court's order became final and was never appealed.

Unfortunately, this does not end the matter. In

May 1985, the replacement tire for the first Uniroyal tire failed due to tread separation. This time, plaintiff replaced that tire with a different manufacturer's tire at a cost of $61.24. Thereafter the plaintiff instituted the present action.

Plaintiff's amended complaint consists of four counts. Count I is a RICO claim for civil damages challenging Uniroyal's use of warranty scheme that allegedly employs inflated adjustment prices. According to plaintiff, customers who buy replacement tires under this warranty actually pay more than if they bought the same tires at retail price. The only overcharge specifically referred to involves the tires bought in May 1984 from Jake's Tire.

Count II is an action for fraud under RICO and is premised on Uniroyal knowingly having sold plaintiff defective tires. This Count refers to all the tire failures. Count III is apparently an action in tort for negligence, based primarily on Uniroyal's failure to recall the tires in question. Count IV seeks actual, compensatory and punitive damages from Uniroyal for its failure to abide by an order of this court. Plaintiff

claims that Uniroyal is in some way accountable for this Court's order dismissing plaintiff's original complaint and giving him only fifteen days to amend instead of the 27 days he requested. Because of the more limited time frame, plaintiff had to return immediately from Florida, where he was constructing a home, thereby incurring actual damages in the amount of $2570.

Discussion:

The Court grants summary judgment for defendant on all four counts. The Court dismisses the fourth count out of hand since it clearly fails to state a claim upon which relief can be granted. The other three counts require greater discussion.

The Court finds Counts I and II barred by res judicata. Count III is not so barred. However, liability on that count depends on the tires being defective, an issue already litigated in state court and adjudged against plaintiff. Plaintiff is thus collaterally estopped from relitigating that issue, and judgment must be rendered against him.[1]

There are three essential elements to res judicata. First, there must be a final judgment on the merits in an earlier suit. Second, there must be an identity of the "cause of action" in both the earlier and the later suit. And, third, there must be an identity of parties or privies in the two suits. See Nash County Board of Education v. Biltmore Company, 640 F2d 484 (4th Cir. 1981), cert. denied, 454 U.S. 878 (1981), reh'g denied, 454 U.S. 1117 (1981); Thomas v. Consolidation Coal Co., 380 F.2d 69 (4th Cir. 1967), cert. denied, 389 U.S. 1004 (1967), reh'g denied, 389 U.S. 1059 (1968).

In this case, the first element of res judicata is present since there was a final judgment in state court; the federal courts have consistently accorded preclusive effect to issues decided in state courts. See, e.g., Allen v. McCurry, 449 U.S. 90 (1980); Angel v. Bullington, 330 U.S. 183 (1947). See also 28 U.S.C. §1738. The third element is also present since the parties in both suits are identical. Thus, the third element of res judicata is present. The only remaining element in question is the second: an identity of the "cause of action."

The term "cause of action" is an elusive concept; its interpretation varies depending on the case. At times, courts look to whether the "operative facts" in the two cases are the same. See, e.g., The Haytian Republic, 154 U.S. 118 (1894). At other times, they look at whether the same primary right is asserted. See, e.g., Baltimore S.S. Co. v. Phillips, 274 U.S. 316, 321 (1927). See also Nash County Board of Education, 640 F.2d at 487-88. The current trend is to look at the facts themselves to see if the two suits arise out of the same "transaction." As stated in the Restatement (Second) of Judgments, when there is a valid and final judgment on the plaintiff's claim, "the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of transactions, out of which the action arose." Restatement (Second) of Judgments §24 (1982)(emphasis added).

This "transactional" view of a claim describes the claim "in factual terms" and makes it "coterminus with the transaction regardless of the number of

substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights." Restatement (Second) of Judgments §24 Comment a (1982). In other words, a plaintiff has one day in court with respect to each transaction—one bite at the apple—and he cannot return day after day, presenting each time a new legal theory to support his claims. The Court finds this approach eminently reasonable and, in fact, essential given the overly litigious nature of today's society.[2]

Given this construction of the term "cause of action," counts I and II both involve the same "causes of action" as presented to the state court. Both arise out of the same transaction: (1) the sale of five allegedly defective tires and (2) the use of the Adjustment Price Index by Jake's Tire. Thus, both counts I and II are barred under the doctrine of res judicata.[3]

In Count III, plaintiff alleges that Uniroyal was negligent in failing to recall six tires at issue. Although this claim may or may not be barred under res judicata, it is at least collaterally estopped since the claim depends on the existence of defective tires. (Before any duty to recall may be imposed, the tires must be proven defective.) Under the doctrine of collateral estoppel, even if the second cause of action is based upon a different cause of action, the prior judgment precludes relitigation of issues actually litigated and necessary to the outcome of the first claim. See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979). See, e.g., Bates v. Devers, 214 Va. 667, 202 S.E.2d 917 (1974); Doummar v. Doummar, 210 Va. 189, 169 S.E.2d 454 (1969); Kemp v. Miller, 166 Va. 661, 186 S.E. 99 (1936).

The Court notes that the present suit includes an additional tire failure, one which occurred in May 1985. Plaintiff is of course entitled to sue on that occurrence since he has not yet had his day in court. However, that tire failure alone cannot support any RICO claims since RICO claims require two predicate

acts. See 18 U.S.C. 1961(5). See also U.S. v. Ruggiero, 726 F.2d 913 (2d Cir. 1984), cert. denied, — U.S. —, 105 S.Ct. 118 (1984). Nor would the Court be inclined to exercise pendent jurisdiction over a state law claim based on this tire failure. Thus, the Court dismisses without prejudice any claims that the plaintiff may have based on this final tire failure alone. Plaintiff may seek his remedies as to that tire failure in state court.

An order will issue in accordance with this opinion.

FOOTNOTES

1. Plaintiff titles Count III "Action in Tort for Negligence," but he claims jurisdiction under RICO. The Court finds it unnecessary for the purposes of this order to determine whether plaintiff has in fact stated a claim under RICO.

2. The Court recognizes that a federal court must give to a state court judgment the same preclusive

effect as would be given that judgment under the law of the state in which it was rendered. Migra v. Warren City School District Board of Education, 465 U.S. 75, 104 S.Ct. 892 (1984). In Virginia, a judgment in a cause of action bars all subsequent proceedings upon the same cause of action between the same parties and those in privity with them, whether or not all potential issues involved were actually presented or litigated in the first proceeding. See Bates v. Devers, 214 Va. 667, 202 S.E.2d 917 (1974); Barkman v. Chevalier, 214 Va. 6, 196 S.E.2d 911 (1973). The "infallible" test of whether the cause of action in the second suit is the same as in the first is whether the facts essential to sustain the two suits are the same. Alderman v. Chrysler Corp., 480 F. Supp. 600 (E.D.Va 1979); Bittner v. West Virginia-Pittsburgh Coal Co., 15 F.2d 652, 655 (4th Cir. 1926); Cohen v. Power, 183 Va. 253, 32 S.E.2d 64 (1944). The Court finds that, whether or not all the facts necessary to plaintiff's present claims are identical to all of those necessary to prove his prior state law claims, the key facts in each are identical. Although there may be different factual nuances

depending on the theory of law, the plaintiff must prove in each (1) that the tires were defective; and (2) that he was overcharged. At a minimum, plaintiff's present claims are barred under the doctrine of collateral estoppel since the key factual issues have already been litigated. See Bates v. Devers, 214 Va. 667, 202 S.E.2d 917 (1974).

3. The Court finds it irrelevant that RICO provides for treble damages while the state common law under which plaintiff sued in state court did not. Plaintiff had the option to sue in state or federal court and he chose the state. He has thus waived his federal relief under RICO. As one commentator has noted:

> "When this choice-of-forum is present, it is difficult to justify providing immunity from estoppel effect on the ground that a litigant has the privilege to litigate under federal procedure — he has, in effect, waived any such privilege by choosing a state court in the first suit."

Note, "Res Judicata: Exclusive Federal Jurisdiction and the Effect of Prior State Court Adjudications," 53

Va. L. Rev. 1360, 1383 (1967), quoted with approval in Nash County Board of Education, 640 F.2d at 492.

Let the Clerk send a copy of this memorandum opinion to plaintiff and to all counsel of record.

(1/10/86 (Richard L. Williams)

DATE UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 86-1023

Bill J. Cory,

Appellant,

versus

Uniroyal, Inc.,

Appellee,

and

J.P. Flannery,
President, Uniroyal, Inc.,

Defendant.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Richard L. Williams, District Judge.

Upon consideration of the appellant's pro se petition for rehearing,

IT IS ORDERED that the petition for rehearing is denied. [Filed June 17, 1986]

Entered at the direction of Judge Butzner with the concurrence of Judge Murnaghan and Judge Ervin.

For the Court,

(John M. Greacen)

CLERK

WARRANT IN DEBT

FAIRFAX COUNTY By: _____ Deputy Clerk, District Court

COURTROOM 2-A, 4110 CHAIN BRIDGE ROAD, FAIRFAX, VIRGINIA 22030

TO ANY AUTHORIZED OFFICER:

You are hereby commanded to summon the Defendant(s) to appear at

September 24, 1984 @ 9:30 AM before this Court to answer the complaint of the Plaintiff(s) upon a claim of nonpayment of a debt in the sum of

$ 235.22 net of any credits with interest; consequential damages $1000.

until paid,

$ 13.00 costs, and $ attorney's fees.

☐ Open Account ☐ Contract ☐ Note ☒ Other (EXPLAIN) sold me 5 unmerchantible tires.

Homestead Exemption waived? ☐ yes ☐ no ☐ cannot be demanded

8-28-84 James A. Belew Jr.

CASE DISPOSITION

JUDGMENT that Plaintiff(s) recover against ☐ named Defendant(s) ☐

$ net of any credits with interest;

$ until paid.

$ costs, and $ attorney's fees.

Homestead Exemption waived? ☐ yes ☐ no ☐ cannot be demanded

☐ JUDGMENT FOR ☐ NAMED DEFENDANT ☒ JUDGMENT FOR DEFENDANT ON MOTION TO STRIKE

☐ NON-SUIT ☐ DISMISSED

Defendant(s) present? Yes ☒ No ☐

January 2, 1985 _____

9-24-84 84-18977

BILL J. CORY

2574 Chain Bridge Rd

Vienna, VA 22180

V.

UNIROYAL, INC

Serve: Calvin P. Major

200 West Grace st

Richmond, VA 23220

WARRANT IN DEBT

TO DEFENDANT You are not required to appear; however, if you fail to appear, judgment may be entered against you.

CONTESTED CASES.

☐ will be heard on return date.

☐ will be set for later date

Bill of Particulars GRANTED DENIED

Grounds of Defense GRANTED DENIED

ATTORNEY FOR PLAINTIFF(S)

ATTORNEY FOR DEFENDANT(S)

P 24

Supreme Court, U.S.
FILED
OCT 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-479

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BILL J. CORY,

Petitioner,

v.

UNIROYAL, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Fourth Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

THOMAS F. FARRELL, II

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October 15, 1986

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QUESTIONS PRESENTED

1. Whether the Racketeer Influenced and Corrupt Organizations Act requires more than one alleged predicate offense to state a cause of action.

2. Whether the lower courts properly applied the doctrines of *res judicata* and collateral estoppel to a claim that had been fully litigated in the state courts of Virginia.

3. Whether proper application of the doctrines of *res judicata* and collateral estoppel violates the right to a trial by jury provided by the Seventh Amendment.

LIST OF PARTIES

The parties to the proceedings below were the Petitioner Bill J. Cory and the Respondents, Uniroyal, Inc.[1] and J. P. Flannery, president of Uniroyal, Inc. No appeal has been taken with respect to Mr. Flannery.

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[1] *Rule 28.1 Listing.* Subsequent to the institution of this suit Uniroyal, Inc. combined its tire operations with Goodrich Tire, Inc. and Automotive Proving Grounds. The parent company of Uniroyal, Inc. is C.D.U. Holding, Inc. Goodrich Tire, Inc. and Automotive Proving Grounds are subsidiaries of The B.F. Goodrich Company which itself has no parent. The following is a listing of affiliates and subsidiaries that are not wholly-owned of The B.F. Goodrich Company, Uniroyal, Inc. and The Uniroyal Goodrich Tire Company.

Uniroyal, Inc.
Subsidiaries Not 100% Wholly Owned

Premier Chemical

Uniroyal, Inc.
Affiliated Companies

Monochem, Columbus, OH
Rubicon, Wilmington, DE
American Sales & Purchases, Inc. (through interest in PASA)
Durham
Metrodyne
PASA
Ciaquimaca Ameyal, S.A.
Novaquim, S.A. de C.V.
Inmoviliaria Hulquimex, S.A. de C.V.
Industries Gustafson S.A. de C.V.
Orchem (Proprietary Limited)
Emege Revere Thread Company, Ltd.
Emerge · Revere Draadmaatschappij

The B. F. Goodrich Company
Subsidiaries Not 100% Wholly Owned

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BF Goodrich Chemical de Venezuela, C.A.
Policyd, S.A. de C.V.
Fosroc Tremco Pty. Limited
PABCO Holdings Pty. Limited
Japan Power Brake, Inc.

The Uniroyal Goodrich Tire Company
Subsidiaries Not 100% Wholly Owned

Compania Hulera Euzkadi, S.A.
Lima Caucho Company, S.A.
Mobex Corporation
Uniroyal S.A. de C.V.

The Uniroyal Goodrich Tire Company
Affiliated Companies

Lim-Holding
Tigar

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MISCELLANEOUS:

Restatement (Second) of Judgments § 24 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-479

BILL J. CORY,

Petitioner,

v.

UNIROYAL, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reprinted in Appendix A hereto, 1a-4a. The opinion of the District Court is reprinted in Appendix B at pages 5a-13a.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATUTES INVOLVED

This case concerns in part an interpretation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.* The specific provisions discussed are set forth in Appendix C.

STATEMENT OF THE CASE

A. Procedural Posture of the Case.

On June 24, 1985, Bill J. Cory ("Cory") filed a "Complaint for Damages" against Uniroyal, Inc. ("Uniroyal") and its president, Mr. J. P. Flannery ("Flannery") concerning certain allegedly defective tires he purchased in October, 1976. The initial Complaint was dismissed without prejudice.

Cory then filed an amended "Complaint for Damages" against Uniroyal and Flannery containing four counts. Mr. Flannery was dismissed as a defendant on September 27, 1985. By memorandum opinion and order summary judgment was granted to Uniroyal on January 10, 1986. The matter was appealed to the United States Court of Appeals for the Fourth Circuit which unanimously affirmed the District Court on May 22, 1986. A petition for a rehearing was denied by the Court of Appeals on June 17, 1986.

B. Statement of Facts.

In October 1976 Cory purchased a new 1977 Pontiac, having as original equipment five Uniroyal PR6 WSW radial steelbelted tires. Almost five years later, in September of 1981, one of the tires failed due to a tread separation. The tire was adjusted and replaced at a cost of $47.63. In April 1982, a second tire failed, again allegedly due to tread separation. Cory attempted to have the tire replaced by PanAmerican

Tires in Daytona Beach, Florida, but PanAmerican refused to honor the Uniroyal warranty. The tire ultimately was replaced at a cost of $39.15.

At this point, Cory filed suit in the General District Court of Fairfax County, Virginia[2] against Master Auto Service and UniRoyal for PanAmerican Tires' refusal to honor the Uniroyal warranty. Cory obtained a default judgment against both defendants in the amount of $184 and the judgment was satisfied.

A third tire failed in December 1983, again allegedly due to tread separation, and, pursuant to the manufacturer's warranty, was replaced by PanAmerican Tires at a cost of $21.14. The two remaining tires failed in May 1984 and were replaced at a cost of $127.30.

After these later tire failures Cory again brought suit against Uniroyal in the General District Court of Fairfax County, Virginia seeking $235.22 in compensatory damages and $1,000 in punitive damages for the sale of five unmerchantable tires.[3] Cory computed the amount of compensatory damages based on the

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[2] In Virginia, General District Courts have *exclusive* original jurisdiction of civil cases for money damages in which the claim does not exceed $1,000 and *concurrent* jurisdiction with a Circuit Court for claims in amounts between $1,000 and $7,000. VA. CODE § 16.1-77 (1982 Repl. Vol. & Supp. 1986). Either party has an absolute right of appeal from a General District Court to the Circuit Court, in which trial by a jury is guaranteed pursuant to VA. CODE § 16.1-106. Such trials are to be *de novo*. VA. CODE § 16.1-113. See discussion in *Beaudett v. City of Hampton*, 775 F.2d 1274 (4th Cir. 1985).

[3] This claim, amounting to more than $1,000, could have been filed by Cory in the Fairfax County Circuit Court, thus entitling him to a trial by jury. VA. CODE § 17-123.

amount of money that he was charged for the five tires including a claimed overcharge on tires four and five. In determining the price of these latter two tires, the retailer had relied upon Uniroyal's Adjustment Price Index, the prices of which Cory alleged were inflated.

At trial in the General District Court on January 2, 1985, the trial judge granted Uniroyal's motion to strike Cory's evidence for failing to carry his burden of proof and entered judgment in Uniroyal's behalf. Cory never exercised his absolute right to appeal to the Circuit Court and the judgment became final.

In May 1985 the replacement tire for the first Uniroyal tire failed due to tread separation. On this occasion Cory replaced that tire with a different manufacturer's tire at a cost of $61.24. Thereafter Cory filed his Complaint in the District Court.

The Amended Complaint consisted of four counts.[4] Count I was a RICO claim for civil damages challenging Uniroyal's use of the warranty scheme that Cory claimed inflated adjustment prices. Count II was an action for fraud under RICO and was premised upon empty allegations that Uniroyal knowingly sold Cory defective tires. This Count referred to all of the tire failures. Count III was an action in tort for negligence based primarily upon Uniroyal's failure to recall the tires in question.

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[4] Count IV sought compensatory and punitive damages from Uniroyal for its alleged failure to abide by a Scheduling Order issued by the District Court. Cory has not raised this issue on appeal to this Court and thus it has been abandoned.

REASONS FOR DENYING THE WRIT

I. THE ISSUES PRESENTED ARE NOT OF SUFFICIENT MOMENT TO INVOKE THE DISCRETIONARY JURISDICTION OF THIS COURT

Cory for the first time in this Court claims that he was denied the right to trial by a jury because the District Court applied the doctrines of *res judicata* and collateral estoppel in awarding Uniroyal and Flannery summary judgment. This Court should not consider an issue raised for the first time in the petition for a writ. *See McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940).

Even so, Cory claims that the "facts of the case had never before been presented or decided upon their merit". Petition at i. That statement simply results from a misunderstanding of Virginia law. In fact, Cory fully litigated his claim against Uniroyal in the General District Court of Fairfax County. His case was dismissed because he did not put on sufficient proof that there was any defect in the tires at the time they left the manufacturer's hands, a burden Cory bore under Virginia law. *See Logan v. Montgomery Ward*, 216 Va. 425, 428 (1975). Cory chose not to appeal that decision to the Circuit Court of Fairfax County which he had an absolute right to do. VA. CODE § 16.1-106. Once in the Circuit Court Cory a right to a jury trial was guaranteed by the Constitution of Virginia. VA. CONST. art. I, § 11. Thus, if Cory did not receive a jury trial it was do solely to his own conduct.

Further, the issues presented are necessarily narrow and affect only the parties involved in this litigation. The District Court only applied the doctrines

of *res judicata* and collateral estoppel to the facts of this specific case. The decision on the merits would have no effect other than on the rights of these three parties with regard to the sale of six tires. Indeed, the Petition does not even presume to present issues that warrant this Court's review.

Cory has not attempted to rely on any of the traditional grounds which this Court has enumerated as a basis to invoke its discretionary jurisdiction. There is no conflict with the decision of another court of appeals; no important state or territorial law has been brought into question; no federal question has been decided in a manner that conflicts with a prior decision of this Court; nor has the Court of Appeals so far departed from the accepted and usual course of judicial proceedings that this Court should exercise its power of supervision. *See* Sup.Ct.R. 17.1. Moreover, on the facts presented the District Court was manifestly correct. In short, there simply is no reason for the Court to hear and decide this case.

II. THE DECISION BELOW WAS CLEARLY CORRECT

A. Cory Failed to Demonstrate More Than One Alleged Predicate Offense.

Cory's first two counts assert violations of RICO through the alleged use of an inflated price list in connection with warranty replacements and through a claimed knowing sale of defective tires.

As the Court of Appeals noted, a violation of RICO requires "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity". 18 U.S.C. § 1962(c). *See Sedima, S. P. R. L. v. Imrex Co.*, 473 U.S. ___, 87 L.Ed.2d 346 (1985). A "pattern of rack-

eteering activity requires at least two acts of racketeering activity". 18 U.S.C. § 1961(5). "Racketeering activity" is defined to include mail fraud, 18 U.S.C. § 1961(1), which Cory asserted was the racketeering activity engaged in by Uniroyal.

The so-called "mail fraud" was Uniroyal's promulgation of the Adjustment Based Price List (ABPL) containing, Cory claimed, prices higher than various floor prices for the tires. Cory claimed that on May 30, 1984 he replaced two tires then under warranty, and that the retailer pro-rated the cost of the two tires on the basis of the ABPL. Because the ABPL prices were higher than the floor prices Cory claimed that the replacement price was higher than it should have been. The May 30, 1984 tire purchase was the *only* time Cory asserted that he was overcharged due to inflated ABPL prices. Therefore, as held by the Court of Appeals, even if the ABPL pricing can be characterized as mail fraud which is doubtful, Cory utterly failed to demonstrate the requisite "two acts" required by RICO for a finding of racketeering activity.

The Court of Appeals further found that Cory had stated no other type of racketeering conduct. He claimed only that Uniroyal sold him unmerchantable tires. The issue of whether five of these tires were unmerchantable had been decided adversely to Cory in the state court. *See* discussion *infra* at 4. As to the remaining tire, the claim was for $61.24. The District Court was without jurisdiction either under RICO or pursuant to diversity jurisdiction to entertain that claim. As noted by the Court of Appeals, Uniroyal "did not, by placing an allegedly defective tire

on the market, or by failing to recall that tire, engage in racketeering activity." App. at 3a.

Cory did not demonstrate the requisite two predicate acts to sustain a cause of action under RICO. Accordingly, the decision of the Court of Appeals was manifestly correct.

B. Counts I, II and III are Barred by the Doctrines of Res Judicata and Collateral Estoppel.

In addition to not proving more than one alleged predicate act sufficient to invoke RICO, Cory's claims were barred by the doctrines of collateral estoppel and *res judicata.*

Prior to instituting the instant suit, Cory had sued Uniroyal on two previous occasions over the same allegedly defective tires. In the first suit Cory sued Uniroyal for PanAmerican's refusal to honor Uniroyal's manufacturer's warranty. Cory received a default judgment which was satisfied. Cory next sued Uniroyal for the breach of an implied warranty and for conducting business in "bad faith". That matter was tried on January 2, 1985. Cory lost after a full trial and did not appeal.

There are three essential elements to *res judicata.* First, there must be a final judgment on the merits in an earlier suit. Second, there must be an identity of the causes of action in both suits. Third, there must be an identity of parties. *See Nash County Board of Education v. Biltmore Co.*, 640 F.2d 484 (4th Cir.), *cert. denied*, 454 U.S. 878, *reh'g denied*, 454 U.S. 1117 (1981).

Obviously the first two elements of *res judicata* were present in the instant action as there was a final judgment in state court and Cory was the

plaintiff in both cases. *See, e.g., Allen v. McCurry*, 449 U.S. 90 (1980); *Angel v. Boyington*, 330 U.S. 183 (1947); *see also* 28 U.S.C. § 1738. The only remaining element for discussion is the identity of the causes of action.

As noted by the District Court, relying on the Restatement (Second) of Judgments,[5] when there is a valid and final judgment of the plaintiff's claim:

> The claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of transactions, out of which the action arose.

App. at 10a.

The drafters of the Restatement have noted that this view of a claim describes it in "factual terms" and makes it

> co-terminus with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to plaintiffs; regardless of the number of primary rights that may have been invaded; and regardless

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[5] A federal court, of course, must give to a state court judgment the same preclusive effect as would be given that judgment under the law of the state in which it was rendered. *Migra v. Warren City School District Bd. of Ed.*, 465 U.S. 75 (1984). In Virginia a judgment in a cause of action bars all subsequent proceedings upon the same cause of action between the same parties *whether or not* all potential issues involved were actually presented or litigated in the first proceeding. *See Bates v. Devers*, 214 Va. 667 (1974).

> of the variations in the evidence needed to support the theories or rights.

Restatement (Second) of Judgments, § 24, comment a (1982).

In the words of the District Judge, a plaintiff "has one day in court with respect to each transaction—one bite of the apple—and he cannot return day after day, presenting each time a new legal theory to support his claim." App. at 10a.

As it would be necessary for Cory to prove the same essential elements in both the prior proceedings and the federal proceeding, *viz.*, that the tires were defective and that he was overcharged, Virginia law would preclude further litigation of this matter. *Bates v. Devers, supra,* at n.5. Since Counts I and II both involve the same causes of action as presented in the state court as they arose out of the same transaction, they are barred by the doctrine of *res judicata.*

In Count III Cory alleged that Uniroyal was negligent for failing to recall six tires. Cory is collaterally estopped from asserting that issue since the claim depends upon the tires *being* defective. That issue was explicitly litigated in the General District Court of Fairfax County and found adversely to Cory. Accordingly, that claim was barred. *See, e.g., Bates v. Devers,* supra at n.3.; *Doummar v. Doummar,* 210 Va. 189 (1969); *Kemp v. Miller,* 166 Va. 661 (1936).[6]

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[6] Count III included a claim that a sixth tire was defective, a matter which had not previously been litigated. The District Court found that that defective tire alone could not support a RICO claim since RICO requires two predicate acts. The Court

C. Application of the Doctrines of Res Judicata and Collateral Estoppel did not Deprive Cory of a Right to Trial by Jury.

Finally, the application of the doctrines of collateral estoppel and *res judicata* did not deprive Cory of a right to trial by jury guaranteed by the Seventh Amendment. That issue in a slightly different form was before this Court in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). There, the petitioners argued that the application of collateral estoppel violated the Seventh Amendment because, as applied in that case, there was no mutuality. 439 U.S. at 335.

In rejecting that argument, Justice Stewart wrote:

> the [Seventh] Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details, varying even then so widely among common-law jurisdictions. [citing *Galloway v. United States*, 319 U.S. 372 (1942)]. . .

439 U.S. at 337.

Continuing, while Justice Stewart noted that the law of collateral estoppel had evolved subsequent to the adoption of the Bill of Rights, he found that application of the doctrine did not interfere with the right to a trial by jury:

> Under the rationale of the *Galloway* case, these developments are not repugnant to the Seventh Amendment simply for the reason that they did not exist in 1791. Thus if, as

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also explicitly stated that it would not exercise pendant jurisdiction over this state law claim and dismissed that portion of Count III *without* prejudice. App. at 5a.

> we have held, the law of collateral estoppel forecloses the petitioners from relitigating the factual issues determined against them in the SEC action, nothing in the Seventh Amendment dictates a different result. . . .

439 U.S. at 337. Surely, the same reasoning applies in this context even more forcefully. Cory has had his day in court against Uniroyal. To permit him to bring a later action with a different twist would open a floodgate of litigation and obliterate the doctrines of *res judicata* and collateral estoppel.

CONCLUSION

For the reasons stated, the respondent respectfully submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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**(Counsel of Record)*

Counsel for Respondent

October 15, 1986

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 86-1023

BILL J. CORY,

Appellant,

versus

UNIROYAL, INC.,

Appellee,

and

J. P. FLANNERY,
President, Uniroyal, Inc.,

Defendant.

Appeal from the United States District Court for the Eastern District of Virginia at Alexandria. Richard L. Williams, District Judge. (C/A No. 85-728-A)

Submitted: April 28, 1986 Decided: May 22, 1986

Before MURNAGHAN and ERVIN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

(Bill J. Cory, Appellant Pro Se. John E. McIntosh, Jr., Boothe, Prichard & Dudley, for Appellee.)

PER CURIAM:

Bill J. Cory sued Uniroyal, Inc. in federal district court for damages allegedly arising out of the sale and replace-

ment of defective tires. Cory brought his complaint in four counts for:

> (1) violation of the Racketeer Influenced and Corrupt Organizations Act (RICO) through use of an inflated price list in connection with warranty replacements;
>
> (2) violation of RICO through the knowing sale of defective tires;
>
> (3) negligence in failing to recall defective tires; and
>
> (4) failure to abide an order of the court.

The district court entered judgment for Uniroyal on all four counts with the exception that Cory's claims arising out of a May 1985 tire failure were dismissed without prejudice. We affirm.

A violation of RICO, 18 U.S.C. § 1962(c), requires "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima, S.P.R.L. v. Imrex Co.*, ___ U.S.___, 53 U.S.L.W. 5034, 5038-39 (July 1, 1985). A " 'pattern of racketeering activity' requires at least two acts of racketeering activity." 18 U.S.C. § 1961(5). "Racketeering activity" is defined to include mail fraud, 18 U.S.C. § 1961(1), asserted by Cory to be the racketeering activity engaged in by Uniroyal.

The act of mail fraud asserted by Cory is Uniroyal's promulgation of an Adjustment Base Price List (ABPL) containing prices higher than various floor prices for the tires. Cory claims that on May 30, 1984, he had to replace two tires then under warranty, and that Jake's Tire prorated the cost of the two tires on the basis of the APBL. Because the ABPL prices were higher than the floor prices, Cory's adjusted warranty price, although still lower than the floor price, was allegedly higher than it should have been. The May 30, 1984 tire purchase is the only time

Cory asserts that he was overcharged due to inflated APBL prices. Therefore, even if the ABPL pricing could somehow be characterized as mail fraud, which we doubt, Cory has failed to demonstrate the requisite "two acts" of racketeering activity.

Nor has Cory stated any other type of racketeering conduct. He claims that Uniroyal sold him unmerchantable tires. As held by the district court, the issue of whether five of these tires were unmerchantable had been decided adversely to Cory in state court. As to a sixth tire, the district court found itself without jurisdiction, either under RICO or pursuant to diversity jurisdiction, to address Cory's claim that the tire was defective. Uniroyal did not, by placing an allegedly defective tire on the market, or by failing to recall that tire, engage in racketeering activity. Moreover, as Cory replaced the tire for $61.24, his claim would not meet the $10,000 jurisdictional requirement for diversity jurisdiction.

Cory also claims that Uniroyal fraudulently denied in state court that the tires were defective. Uniroyal's defense of the state court action would not, however, constitute racketeering activity within the meaning of 18 U.S.C. § 1961(1).

Cory's final claim, based upon Uniroyal's alleged noncompliance with the district court's scheduling order, is totally without merit. Finding the judgment of the district court to be proper in all respects, we affirm. We dispense with oral argument because the facts and legal contentions are adequately developed in the materials before the Court, and argument would not aid the decisional process.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-1023

BILL J. CORY,

Appellant,

versus

UNIROYAL, INC.,

Appellee,

and

J. P. FLANNERY,
President, Uniroyal, Inc.,

Defendant.

FILED

JUN 17 1986

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Richard L. Williams, District Judge.

Upon consideration of the appellant's pro se petition for rehearing,

IT IS ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Butzner with the concurrence of Judge Murnaghan and Judge Ervin.

For the Court,

/s/ JOHN M. GREACEN
Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

Civil Action No. 85-728-A

BILL J. CORY

Plaintiff,

v.

UNIROYAL, INC.

Defendant.

ORDER

This matter comes before the Court on defendant's motion for summary judgment. For reasons stated in the accompanying memorandum, the Court hereby GRANTS defendant's motion and enters JUDGMENT in favor of the defendant on all four counts, with the following exception. The Court specifically reserves judgment on all causes of action with respect to the failure in May 1985 of plaintiff's replacement tire, and dismisses the Complaint as to this tire failure without prejudice.

Let the Clerk send a copy of this order to plaintiff and all counsel of record.

Jan 10, 1986
Date

Richard L. Williams
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

Civil Action No. 85-728-A

BILL J. CORY

Plaintiff,

v.

UNIROYAL, INC.

Defendant.

MEMORANDUM OPINION

This matter comes before the Court on defendant's motion for summary judgment. For reasons stated below, the Court hereby GRANTS defendant's motion.

Procedural Posture of the Case:

On June 24, 1985, plaintiff filed a "Complaint for Damages" against Uniroyal and its president, Mr. J.P. Flannery, concerning certain allegedly defective tires he received as original equipment on a 1977 Pontiac. Plaintiff had purchased this Pontiac new in October 1976.

In response to plaintiff's complaint, defendants filed a motion to dismiss. The Court ruled on this motion on August 12, 1985 and granted it in part. The Court dismissed the complaint without prejudice and granted the plaintiff fifteen (15) days in which to file an amended complaint.

Plaintiff then filed an amended "Complaint for Damages" against the defendants, and the defendants in response filed another motion to dismiss. Plaintiff filed simultaneously a motion to vacate the Court's scheduling

order. On September 27, 1985, this Court granted Mr. Flannery's motion, dismissing the Complaint as to him, but denied Uniroyal's motion to dismiss and plaintiff's motion to vacate the scheduling order.

Discovery has since concluded and defendant Uniroyal now comes before the Court requesting that summary judgment be entered in its favor.

Statement of Facts:

In October 1976, plaintiff purchased a new 1977 Pontiac, having as original equipment five Uniroyal PR6 WSW radial steel belted tires. About five years later, in September 1981, one of the tires failed due to tread separation. The tire was adjusted and replaced at a cost of $47.63. In April 1982, a second tire failed, again due to tread separation. Plaintiff attempted to have the tire replaced by Pan American Tires in Daytona Beach, but Pan American refused to honor the Uniroyal warranty. The tire was replaced ultimately by American Tires in Atlanta at a cost of $39.15.

At that point, plaintiff brought suit in the Fairfax County General District Court against Master Auto Service and Uniroyal for Pan American Tires' refusal to honor the Uniroyal warranty. He obtained a default judgment against both defendants in the amount of $184.00 and the judgment was satisfied.

A third tire failed in December 1983, again due to tread separation, and, pursuant to the manufacturer's warranty, was replaced by Pan American Tires of Daytona Beach at a cost of $21.14. The two remaining tires failed in May 1984 and were replaced by Jake's Tire of Terre Haute, Indiana, at a cost of $127.30.

After these tire failures, plaintiff brought suit against Uniroyal in the Fairfax County General District Court, seeking $235.22 in compensatory damages and $1000 in punitives damages for the sale of five unmerchantible tires.

Plaintiff computed the amount of compensatory damages based on the amount of money that he was charged for the five tires; he included therein what he considered an overcharge on tires number 4 and 5. (In determining the price of these latter two tires, Jake's Tire had relied on Uniroyal's Adjustment Price Index, the prices of which plaintiff insists are inflated.)

On January 2, 1985, following plaintiff's case-in-chief (which consisted only of plaintiff's own testimony), the trial court granted defendant's motion to strike the plaintiff's evidence. The trial court's order became final and was never appealed.

Unfortunately, this does not end the matter. In May 1985, the replacement tire for the first Uniroyal tire failed due to tread separation. This time, plaintiff replaced that tire with a different manufacturer's tire at a cost of $61.24. Thereafter the plaintiff instituted the present action.

Plaintiff's amended complaint consists of four counts. Count I is a RICO claim for civil damages challenging Uniroyal's use of warranty scheme that allegedly employs inflated adjustment prices. According to plaintiff, customers who buy replacement tires under this warranty actually pay more than if they bought the same tires at retail price. The only overcharge specifically referred to involves the tires bought in May 1984 from Jake's Tire.

Count II is an action for fraud under RICO and is premised on Uniroyal knowingly having sold plaintiff defective tires. This Count refers to all the tire failures. Count III is apparently an action in tort for negligence, based primarily on Uniroyal's failure to recall the tires in question. Count IV seeks actual, compensatory and punitive damages from Uniroyal for its failure to abide by an order of this court. Plaintiff claims that Uniroyal is in some way accountable for this Court's order dismissing plaintiff's original complaint and giving him only fifteen days to amend instead of the 27 days he requested. Because of the more

limited time frame, plaintiff had to return immediately from Florida, where he was constructing a home, thereby incurring actual damages in the amount of $2570.

Discussion:

The Court grants summary judgment for defendant on all four counts. The Court dismisses the fourth count out of hand since it clearly fails to state a claim upon which relief can be granted. The other three counts require greater discussion.

The Court finds Counts I and II barred by *res judicata.* Count III is not so barred. However, liability on that count depends on the tires being defective, an issue already litigated in state court and adjudged against plaintiff. Plaintiff is thus collaterally estopped from relitigating that issue, and judgment must be rendered against him.[1]

There are three essential elements to *res judicata.* First, there must be a final judgment on the merits in an earlier suit. Second, there must be an identity of the "cause of action" in both the earlier and the later suit. And, third, there must be an identity of parties or privies in the two suits. *See Nash County Board of Education v. Biltmore Company,* 640 F.2d 484 (4th Cir. 1981), *cert. denied,* 454 U.S. 878 (1981), *reh'g denied,* 454 U.S. 1117 (1981); *Thomas v. Consolidated Coal Co.,* 380 F.2d 69 (4th Cir. 1967), *cert. denied,* 389 U.S. 1004 (1967), *reh'g denied,* 389 U.S. 1059 (1968).

In this case, the first element of *res judicata* is present since there was a final judgment in state court; the federal courts have consistently accorded preclusive effect to issues decided in state courts. *See, e.g., Allen v. McCurry,* 449 U.S. 90 (1980); *Angel v. Bullington,* 330 U.S. 183

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[1] Plaintiff titles Count III "Action in Tort for Negligence," but he claims jurisdiction under RICO. The Court finds it unnecessary for the purposes of this order to determine whether plaintiff has in fact stated a claim under RICO.

(1947). *See also* 28 U.S.C. § 1738. The third element is also present since the parties in both suits are identical. Thus, the third element of *res judicata* is present. The only remaining element in question is the second: an identity of the "cause of action."

The term "cause of action" is an elusive concept; its interpretation varies depending on the case. At times, courts look to whether the "operative facts" in the two cases are the same. *See, e.g., The Haytian Republic,* 154 U.S. 118 (1894). At other times, they look at whether the same primary right is asserted. *See, e.g., Baltimore S.S. Co. v. Phillips,* 274 U.S. 316, 321 (1927). *See also Nash County Board of Education,* 640 F.2d at 487-88. The current trend is to look at the facts themselves to see if the two suits arise out of the same "transaction." As stated in the Restatement (Second) of Judgments, when there is a valid and final judgment on the plaintiff's claim, "the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to *all or any part of the transaction, or series of transactions, out of which the action arose.*" Restatement (Second) of Judgments §24 (1982)(emphasis added).

This "transactional" view of a claim describes the claim "in factual terms" and makes it "coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights." Restatement (Second) of Judgments §24 Comment a (1982). In other words, a plaintiff has one day in court with respect to each transaction—one bite at the apple—and he cannot return day after day, presenting each time a new legal theory to support his claims. The Court finds this approach emi-

nently reasonable and, in fact, essential given the overly litigious nature of today's society.[2]

Given this construction of the term "cause of action," counts I and II both involve the same "causes of action" as presented to the state court. Both arise out of the same transaction: (1) the sale of five allegedly defective tires and (2) the use of the Adjustment Price Index by Jake's Tire. Thus, both counts I and II are barred under the doctrine of *res judicata*.[3]

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[2] The Court recognizes that a federal court must give to a state court judgment the same preclusive effect as would be given that judgment under the law of the state in which it was rendered. *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 104 S.Ct. 892 (1984). In Virginia, a judgment in a cause of action bars all subsequent proceedings upon the same cause of action between the same parties and those in privity with them, whether or not all potential issues involved were actually presented or litigated in the first proceeding. *See Bates v. Devers*, 214 Va. 667, 202 S.E.2d 917 (1974); *Barkman v. Chevalier*, 214 Va. 6, 196 S.E.2d 911 (1973). The "infallible" test of whether the cause of action in the second suit is the same as in the first is whether the facts essential to sustain the two suits are the same. *Alderman v. Chrysler Corp.*, 480 F. Supp. 600 (E.D.Va 1979); *Bittner v. West Virginia-Pittsburgh Coal Co.*, 15 F.2d 652, 655 (4th Cir. 1926); *Cohen v. Power*, 183 Va. 253, 32 S.E.2d 64 (1944). The Court finds that, whether or not *all* the facts necessary to plaintiff's present claims are identical to all of those necessary to prove his prior state law claims, the *key* facts in each are identical. Although there may be different factual nuances depending on the theory of law, the plaintiff must prove in each (1) that the tires were defective; and (2) that he was overcharged. At a minimum, plaintiff's present claims are barred under the doctrine of collateral estoppel since the key factual issues have already been litigated. *See Bates v. Devers*, 214 Va. 667, 202 S.E.2d 917 (1974).

[3] The Court finds it irrelevant that RICO provides for treble damages while the state common law under which plaintiff sued in state court did not. Plaintiff had the option to sue in state or federal court and he chose the state. He has thus waived his federal relief under RICO. As one commentator has noted:

> "When this choice-of-forum is present, it is difficult to justify providing immunity from estoppel effect on the ground that a litigant

In Count III, plaintiff alleges that Uniroyal was negligent in failing to recall six tires at issue. Although this claim may or may not be barred under *res judicata,* it is at least collaterally estopped since the claim depends on the existence of defective tires. (Before any duty to recall may be imposed, the tires must be proven defective.) Under the doctrine of collateral estoppel, even if the second cause of action is based upon a different cause of action, the prior judgment precludes relitigation of issues actually litigated and necessary to the outcome of the first claim. *See Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 326 n.5 (1979). *See, e.g., Bates v. Devers,* 214 Va. 667, 202 S.E.2d 917 (1974); *Doummar v. Doummar,* 210 Va. 189, 169 S.E.2d 454 (1969); *Kemp v. Miller,* 166 Va. 661, 186 S.E. 99 (1936).

The Court notes that the present suit includes an additional tire failure, one which occurred in May 1985. Plaintiff is of course entitled to sue on that occurrence since he has not yet had his day in court. However, that tire failure alone cannot support any RICO claims since RICO claims require two predicate acts. *See* 18 U.S.C. 1961(5). *See also U.S. v. Ruggiero,* 726 F.2d 913 (2d Cir. 1984), *cert. denied,* ___ U.S. ___, 105 S.Ct. 118 (1984). Nor would the Court be inclined to exercise pendent jurisdiction over a state law claim based on this tire failure. Thus, the Court dismisses without prejudice any claims that the plaintiff may have based on this final tire failure alone. Plaintiff may seek his remedies as to that tire failure in state court.

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has the privilege to litigate under federal procedure—he has, in effect, waived any such privilege by choosing a state court in the first suit."

Note, "Res Judicata: Exclusive Federal Jurisdiction and the Effect of Prior State Court Adjudications," 53 *Va. L. Rev.* 1360, 1383 (1967), *quoted with approval in Nash County Board of Education,* 640 F.2d at 492.

An order will issue in accordance with this opinion.

Let the Clerk send a copy of this memorandum opinion to plaintiff and to all counsel of record.

1/10/86 — Richard L. Williams
DATE — UNITED STATES DISTRICT JUDGE

APPENDIX C

United States Constitution, amend. VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

Constitution of Virginia, art. 1 § 11

§ 11. Due process of law; obligation of contracts; taking of private property; prohibited discrimination; jury trial in civil cases.—That no person shall be deprived of his life, liberty, or property without due process of law; that the General Assembly shall not pass any law impairing the obligation of contracts, nor any law whereby private property shall be taken or damaged for public uses, without just compensation, the term "public uses" to be defined by the General Assembly; and that the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged, except that the mere separation of the sexes shall not be considered discrimination.

That in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred. The General Assembly may limit the number of jurors for civil cases in courts of record to not less than five.

28 U.S.C. § 1738

§ 1738. State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.
(June 25, 1948, c. 646, § 1, 62 Stat. 947.)

RACKETEER INFLUENCED AND CORRUPT PRACTICE ACT

18 U.S.C. § 1961. Definitions

As used in this chapter

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal

investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving bankruptcy fraud, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period

of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chap-

ter or the investigative power of such department or agency otherwise conferred by law.

(Added Oct. 15, 1970, P.L. 91-452, Title IX, § 901(a), 84 Stat. 941; Nov. 2, 1978, P.L. 95-575, § 3(c), 92 Stat. 2465.)

18 U.S.C. § 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engages in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct

or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.
(Added Oct. 15, 1970, P.L. 91-452, Title IX, § 901(a), 84 Stat. 941.)

CODE OF VIRGINIA

§ 16.1-77. Civil jurisdiction of general district courts.—Each general district court shall have, within the limits of the territory it serves, civil jurisdiction as follows:

(1) Exclusive original jurisdiction of any claim to specific personal property or to any debt, fine or other money, or to damages for breach of contract or for injury done to property, real or personal, or for any injury to the person, which would be recoverable by action at law or suit in equity, when the amount of such claim does not exceed $1,000 exclusive of interest and any attorney's fees contracted for in the instrument, and concurrent jurisdiction with the circuit courts having jurisdiction in such territory of any such claim when the amount thereof exceeds $1,000 but does not exceed $7,000, exclusive of interest and any attorney's fees contracted for in the instrument.

(2) Jurisdiction to try and decide attachment cases when the amount of the plaintiff's claim does not exceed $7,000 exclusive of interest and any attorney's fees contracted for in the instrument.

(3) Jurisdiction of actions of unlawful entry or detainer as provided in Article 13 (§ 8.01-124 et seq.) of Chapter 3 of Title 8.01, and in Chapter 13 (§ 55-217 et seq.) of Title 55.

(4) Except where otherwise specifically provided, all jurisdiction, power and authority over any civil action or

proceeding conferred upon any trial justice, civil justice, civil and police justice, or police justice under or by virtue of any provisions of the Code of Virginia. (1956, c. 555; 1968, c. 5; 1973, c. 440; 1978, c. 40; 1981, c. 404; 1983, c. 616.)

§ 16.1-106. Appeals from courts not of record in civil cases.—From any order entered or judgment rendered in a court not of record in a civil case in which the matter in controversy is of greater value than fifty dollars, exclusive of interest, any attorney's fees contracted for in the instrument, and costs, or when the case involves the constitutionality or validity of a statute of the Commonwealth, or of an ordinance or bylaw of a municipal corporation, there shall be an appeal of right, if taken within ten days after such order or judgment, to a court of record. Such appeal shall be to a court of record having jurisdiction within the territory of the court from which the appeal is taken. (1956, c.555; 1977, c. 624.)

§ 16.1-113. How appeals tried; power of court when appeal not tried within two years.—Every such appeal shall be tried by the court in a summary way, or, if the amount in controversy exceeds fifty dollars, by a jury if either party requires it. All legal evidence produced by either party shall be heard, whether the same was produced or not before the court from which the appeal is taken. If judgment be recovered by the appellee, execution shall issue against the principal and his surety, jointly or separately, for the amount of the judgment, including interests and costs, with damages on the aggregate at the rate of ten percent annually, from the date of that judgment until payment, and for the costs of the appeal; and the execution shall be endorsed "No security is to be taken." If the decision be reversed, the party substantially prevailing shall recover his costs; and such order or judgment shall be made or given as ought to have been made or given by the judge of the court from which the appeal was taken. When the appeal is from an order or judgment

under §§ 16.1-119 to 16.1-121, the court shall enter such judgment respecting the property, the expense of keeping it, and any injury done to it, as may be equitable among the parties.

No such appeal shall be striken from the docket or discontinued pursuant to § 8.01-335. However, if such appeal is not tried within two years from the date the case has been docketed, then the court may, in the absence of good cause shown for such delay, and after notice to the appellant and his surety, if any, affirm the judgment or order rendered in the district court and award execution thereon against the appellant and his surety. (1956, c.555; 1980, c. 129; 1984, c. 38.)

§ 17-123. Jurisdiction of circuit courts.—The circuit courts shall have jurisdiction of proceedings by quo warranto or information in the nature of quo warranto and to issue writs of mandamus, prohibition and certiorari to all inferior tribunals created or existing under the laws of this State, and to issue writs of mandamus in all matters of proceedings arising from or pertaining to the action of the boards of supervisors or other governing bodies of the several counties for which such courts are respectively held or in other cases in which it may be necessary to prevent the failure of justice and in which mandamus may issue according to the principles of common law. They shall have appellate jurisdiction in all cases, civil and criminal, in which an appeal may, as provided by law, be taken from the judgment or proceedings of any inferior tribunal.

They shall have original and general jurisdiction of all cases in chancery and civil cases at law, except cases at law to recover personal property or money not of greater value than $100, exclusive of interest, and except such cases as are assigned to some other tribunal; also in all cases for the recovery of fees in excess of $100; penalties or cases involving the right to levy and collect toll or taxes or the validity of an ordinance or bylaw of any corporation;

and also, of all cases, civil or criminal, in which an appeal may be had to the Supreme Court. They shall also have original jurisdiction of all indictments for felonies and of presentments, informations and indictments for misdemeanors.

They shall have appellate jurisdiction of all cases, civil and criminal, in which an appeal, writ of error or supersedeas may, as provided by law, be taken to or allowed by such courts, or the judges thereof, from or to the judgment or proceedings of any inferior tribunal. They shall also have jurisdiction of all other matters, civil and criminal, made cognizable therein by law and when a motion to recover money is allowed in such tribunals, they may hear and determine the same, although it be to recover less than $100. (Code 1919, § 5890; 1928, p. 1164; 1973, c. 544; 1977, c. 624.)